RECENT DEVELOPMENTS

BANKRUPTCY—STAY OF DISCHARGE—PROPER ONLY WHERE CREDITOR'S RIGHT TO EXEMPT PROPERTY ACQUIRED BY WAIVER OR CONTRACT—*Harris v. Hoffman, 379 F.2d 413 (8th Cir. 1967)*—Mr. and Mrs. Harris executed a promissory note in favor of Harry Hoffman on January 1, 1957, in the amount of 8,000 dollars. More than a year later the debtors purchased a home in Carroll, Iowa, valued by the trustee in bankruptcy at 12,000 dollars. Creditor Hoffman commenced suit on the note in the District Court of Iowa, which proceeding was stayed on December 17, 1965, the day following the Harrises' petition and adjudication in bankruptcy. Their home was set aside as exempt property by the trustee. Hoffman requested the bankruptcy court to withhold final discharge of the bankrupts so he might obtain judgment in the state court, and become secured by a lien on the bankrupts' exempt homestead. The request was based upon Hoffman's claim that the property was not exempt to him under Iowa law, since the debt pre-dated the acquisition of the property.

Hoffman's request was denied by the referee on three grounds.[1] First, no remedy is available to Hoffman in an Iowa court, as evidenced by the Iowa Supreme Court's decision in *Bracewell v. Hughes*.[2] Second, prior statements of the Eighth Circuit noting the propriety of such stays were dictum.[3] Third, the cases where stays were granted

> involved liens or rights created by waiver or contract and which were in existence at the time the bankruptcy proceedings were commenced.[4]

Hoffman's claim was not created by waiver or contract as defined by those cases.

Hoffman appealed to the United States District Court for the Northern District of Iowa[5] which ordered final discharge be withheld for a reasonable time on the authority of *Duffy*

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1 Record at 8, Harris v. Hoffman, 379 F.2d 413 (8th Cir. 1967).

2 214 Iowa 241, 242 N.W. 66 (1932). For a thorough analysis of this case and the related case of McMains v. Cunningham, 214 Iowa 300, 242 N.W. 106 (1932), *see* Kennedy, *Limitations of Exemptions in Bankruptcy*, 45 IOWA L. REV. 445, 469 n. 117 (1960).

3 Duffy v. Tegeler, 19 F.2d 305 (8th Cir. 1927); Ingram v. Wilson, 125 F. 913 (8th Cir. 1903).

4 Record at 10, Harris v. Hoffman, 379 F.2d 413 (8th Cir. 1967).

5 *Id.* at 13.

v. Tegeler.[6] The court held *Bracewell v. Hughes*[7] provided no equitable remedy existed in Iowa courts for the creditor of a bankrupt. But the plaintiff was not precluded from a remedy at law.[8]

In *Harris v. Hoffman*[9] the Court of Appeals for the Eighth Circuit reversed the district court, refusing the stay on both state and federal grounds. The court held the Iowa Supreme Court had precluded any state remedy,[10] and, even if a state remedy existed, stays are proper under *Lockwood v. Exchange Bank*[11] only where the right claimed in the exempt property was acquired by waiver or contract.

The court of appeals decision alters the rights of a large class of creditors. State exemption schemes often provide that certain classes of creditors may obtain execution on generally exempt property.[12] Previous federal court decisions have recognized the privileged status of those creditors.[13] *Harris v. Hoffman*[14] affects the rights of creditors falling within state exceptions to state exemptions. It prevents those creditors from reaching the exempt property of a bankrupt unless they hold waiver or contract claims. Since they cannot reach exempt property they are confined to their distributive share of the bankrupt's estate. The often elaborate exemption schemes are reduced to their general statements for bankruptcy purposes. The exceptions are in effect eliminated.

In determining whether such a result is dictated by the Bankruptcy Act [15] and its judicial constructions, it is necessary to analyze

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6 19 F.2d 305 (8th Cir. 1927).

7 214 Iowa 241, 242 N.W. 66 (1932).

8 Record at 14, Harris v. Hoffman, 379 F.2d 413 (8th Cir. 1967).

9 379 F.2d 413 (8th Cir. 1967).

10 Bracewell v. Hughes, 214 Iowa 241, 242 N.W. 66 (1932).

11 190 U.S. 294 (1903).

12 *E.g.*, IOWA CODE ANN. § 561.21 (1946), invoked by Hoffman in the principal case, provides:

> The homestead may be sold to satisfy debts of each of the following classes:
> 1. Those contracted prior to its acquisition, but then only to satisfy a deficiency remaining after exhausting the other property of the debtor, liable to execution.

13 *In re* Sokatch, 208 F. Supp. 789, 791 (E.D.N.Y. 1962); *In re* Nixon, 34 F.2d 667, 670 (D. Okla. 1929); *In re* J. E. Maynard & Co., 183 F. 823, 826 (D. Ga. 1910); *In re* Castleberry, 143 F. 1018, 1020 (D. Ga. 1905); *In re* Brumbaugh, 128 F. 971, 974 (D. Pa. 1904). *See* Phillips v. Krakower, 46 F.2d 764 (4th Cir. 1931) and cases cited note 3 *supra.*

14 379 F.2d 413 (8th Cir. 1967).

15 11 U.S.C. §§ 1-1103 (1964). Following citations will be to sections of W. LAUBE, 1966 COLLIER PAMPHLET EDITION, BANKRUPTCY ACT [hereinafter cited as BAUKRUPTCY ACT]. Each section therein shows the equivalent section in the United States Code.

the rights of the three classes of claimants competing for the exempt property: the bankrupt, the individual creditors and the trustee as representative of the general creditors. The bankrupt may have certain property set off to him as exempt from the claims of general creditors.[16] He may also have liens on the exempt property discharged which were obtained by judicial proceedings within four months prior to the filing of the petition in bankruptcy.[17] The individual creditor may have the bankrupt's final discharge withheld under proper circumstances.[18] This enables the creditor to assert his claim in a state court and become secured by obtaining a lien on the exempt property. The trustee may have certain liens preserved for the benefit of general creditors.[19] He is subrogated to the lienholder's right and may obtain execution upon exempt property, including the proceeds in the estate for distribution to the general creditors. This increases the value of the estate and assures each general creditor will realize a greater proportion of his claim.

Each right enhances the position of its holder. But in certain situations they conflict. Before the conflicts are examined, a general survey of the rules surrounding each of the rights is necessary.

The Bankruptcy Act does not affect the allowance to bankrupts of state exemptions.[20] Such exemptions vary widely in form and maximum amount. Property may be exempt from judicial sale[21] or from liens obtained through legal proceedings.[22] Exemptions commonly include the homestead, tools of trade, household goods and wearing apparel.[23] There are classes of creditors and claimants to whom property is often not exempt under state law. These include tort[24] and wage[25] claimants, purchase money[26] and tax[27] creditors

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16 BANKRUPTCY ACT §§ 6, 47a (6).

17 *Id.* at § 67a (3).

18 Lockwood v. Exchange Bank, 190 U.S. 294, 300-01 (1903).

19 BANKRUPTCY ACT § 67a (3).

20 *Id.* at § 6.

21 *E.g.*, IOWA CODE ANN. § 561.16 (1946), the homestead statute in the principal case.

22 *E.g.*, MICH. STAT. ANN. § 27A.4031 (1962).

23 *See* Comment, *Bankruptcy Exemptions: Critique and Suggestions*, 68 YALE L.J. 1459, 1463-69 (1959) for a collection of various provisions in state exemption statutes. *See also* Joslin, *Debtor's Exemption Laws: Time for Modernization*, 34 IND. L.J. 355 (1959).

24 *In re* Brumbaugh, 128 F. 971, 972 (D. Pa. 1904).

25 *E.g.*, ILL. ANN. STAT. ch. 52, §§ 16, 18 (Smith-Hurd 1967); OHIO REV. CODE ANN. § 2329.72 (Page 1953).

26 *E.g.*, FLA. CONST. art. X, § 1 (1885).

27 *E.g.*, OKLA. STAT. ANN. tit. 31, § 5 (1955).

and creditors whose claims existed prior to acquisition of the property.[28]

In bankruptcy proceedings the petition is followed within five days by the bankrupt's claim of exemptions.[29] The trustee is required to

> set apart the bankrupts' exemptions allowed by law, if claimed, and report the items and estimated value thereof to the courts as soon as practicable . . . .[30]

Title to exempt property remains in the bankrupt.[31] The property passes to the trustee as a part of the bankrupt's estate for purposes of segregation, identification and appraisal.[32] Being set off to the bankrupt as exempt does not free the property from liens,[33] nor will a discharge in bankruptcy remove them.[34] The bankruptcy court may not determine claims to exempt property nor grant execution of existing liens thereon.[35] Creditors must assert in a state court their claims to property which the trustee has set off as exempt.[36] The bankrupt may obtain an order from the bankruptcy court to stay a state proceeding any time prior to his discharge.[37] Thus the bankruptcy court determines which creditors may proceed to judgment during the pendency of bankruptcy proceedings. Creditors within exceptions to the bankrupt's exemption may hold claims which will be discharged in bankruptcy.[38] When they hold dischargable claims,[39] their specially recognized status with respect

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28 *E.g.*, IOWA CODE ANN. § 561.21 (1946) reprinted *supra* note 12.

29 BANKRUPTCY ACT § 7a (8). Failure to make a timely claim of exemptions will not defeat the right, General Orders in Bankruptcy Number 11, unless the tardiness would adversely affect creditors. *In re* Fowler, 35 F. Supp. 9 (E.D. Pa. 1940); *In re* W.S. Jennings & Co., 166 F. 639 (N.D. Ga. 1909).

30 BANKRUPTCY ACT § 47a (6).

31 Lockwood v. Exchange Bank, 190 U.S. 294, 299 (1903).

32 Chicago B. & Q. R.R. v. Hall, 229 U.S. 511, 515 (1913).

33 Straton v. New, 283 U.S. 318, 322 (1931).

34 Louisville Bank v. Radford, 295 U.S. 555, 583-84 (1935); Prebyl v. Prudential Life Inc. Co., 98 F.2d 199, 200 (8th Cir. 1938); Personal Finance Co. v. Silver, 327 Ill. App. 554, 64 N.E.2d 398 (1946).

35 Lockwood v. Exchange Bank, 190 U.S. 294, 299-300 (1903); *In re* Urban, 136 F.2d 296, 298 (7th Cir. 1943); Negin v. Salomon, 151 F.2d 112, 114 (2d Cir. 1945); *In re* Yungbluth, 220 F. 110, 111-112 (9th Cir. 1915).

36 Lockwood v. Exchange Bank, 190 U.S. 294, 299 (1903).

37 BANKRUPTCY ACT § 11a.

38 *Id.* at § 17. All provable debts are discharged except the six classes enumerated in this section. *See* J. MACLACHLAN, BANKRUPTCY § 111 (1956) which discusses the effects of a discharge.

39 BANKRUPTCY ACT § 17.

to the bankrupt's exempt property will be rendered valueless unless they have obtained a surviving lien.

The final discharge of a bankrupt occurs according to a prescribed timetable.[40] Creditors who obtain permission to proceed in state court must also have discharge withheld if they are to reach exempt property. In *Lockwood v. Exchange Bank*[41] an unsecured creditor held a note containing a provision which waived the bankrupt's right of homestead in the creditor's favor. The creditor petitioned the bankruptcy court to order the trustee to retain the exempt property. This property would be held for satisfaction of the creditor's claim. The United States Supreme Court held the creditor's claim should be asserted in a state court because the bankruptcy court has limited jurisdiction over exempt property. The Court stated

> the rights of creditors *having no lien,* as in the case at bar, but *having a remedy under the state law against the exempt property,* may be protected by the court of bankruptcy, since, certainly, there would exist in favor of a creditor holding a waiver note, like that possessed by the petitioning creditor in the case at bar, an *equity entitling him to a reasonable postponement of the discharge of the bankrupt,* in order to allow the institution in the state court of such proceedings as might be necessary to make effective the rights possessed by the creditor.[42] (Emphasis added.)

It appears from the above quotation that a creditor may have the bankrupt's final discharge withheld if he complies with two requirements. First, he must present a claim which prima facie indicates an available state remedy. Second, the claim must be one which may be satisfied by executing on exempt property already set off to the bankrupt. Creditors complying with these two requirements necessarily fall within a class to whom the exemption does not apply. *Lockwood* has provided a procedure that operates to the advantage of creditors within that class. If *Harris v. Hoffman*[43] is followed, only specific kinds of creditors within that class may obtain a *Lockwood* stay.

An analysis of *Lockwood's* scope requires examination of its judicial constructions and the Bankruptcy Act. In 1913 section 67f of the Bankruptcy Act provided

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40 *See* 1 W. COLLIER, BANKRUPTCY ¶¶ 14.03-15.00 (14th ed. 1967).

41 190 U.S. 294 (1903).

42 *Id.* at 300.

43 379 F.2d 413 (8th Cir. 1967).

> That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him . . . shall be deemed null and void in case he is adjudged a bankrupt, and the property affected [thereby] . . . shall be deemed wholly discharged and released from the same, and shall pass to the trustees as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right . . . be preserved for the benefit of the estate . . . .[44]

Confronted with a conflict in lower court decisions, the United States Supreme Court in *Chicago B. & Q. R.R. v. Hall*[45] held section 67f operated to discharge liens obtained within the four month period on exempt as well as non-exempt property. If the decision in *Hall* had been limited to the above holding there would have been a basic conflict between creditors in two different positions. Unsecured creditor *A*, to whom the property set off to the bankrupt is not exempt, might obtain a *Lockwood* stay and proceed in the state courts to secure his claim. Creditor *B*, to whom the property is also not exempt, but who had obtained a lien within four months prior to the date of petition, would have his lien discharged. The above anomaly did not escape the *Hall* Court, which reconciled its decision with *Lockwood*:

> The liens rendered void by § 67f are those obtained by legal proceedings within four months. The section does not, however, defeat rights in the exempt property acquired by contract or by waiver of the exemption. These may be enforced or foreclosed by judgments obtained even after the petition in bankruptcy was filed, under the principle declared in *Lockwood* . . . .[46]

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44 J. MACLACHLAN, THE BANKRUPTCY ACT 111 (7th ed. 1965).

45 229 U.S. 511 (1913).

46 *Id.* at 516. In 1938 the Chandler Act was enacted as an attempt to clarify ambiguous areas in bankruptcy law. Sections 67a and 67f in the 1898 Bankruptcy Act were consolidated in § 67a by the Chandler Act. Section 67a(3) states:

> The property affected by any lien deemed null and void under provisions of paragraphs (1) and (2) of this subdivision a shall be discharged from such lien, and such property and any of the indemnifying property transferred to or for the benefit of a surety shall pass to the trustee *or debtor, as the case may be,* except that the court may on due notice order any such lien to be preserved for the benefit of the estate, and the court may direct such conveyance as may be proper or adequate to evidence the title thereto of the trustee or debtor, as the case may be . . . . (Emphasis added.)

The italicized language is a codification of *Hall*. HR. 12889, 74th Cong., 2d Sess. (1936) 209; J. HANNA & J. MACLACHLAN, THE BANKRUPTCY ACT WITH ANNOTATIONS 96 (5th ed. 1953); 4 COLLIER, BANKRUPTCY ¶¶ 67.02, 67.15. Neither legislative history nor any known case evidences any intent to limit the opinion in *Hall*. For criticisms of *Hall* *see* J. MACLACHLAN, BANKRUPTCY § 208.

This language has been interpreted as creating an exception to the discharge of liens on exempt property.[47] In cases where lienholders possess waivers of exemption or rights in the exempt property obtained by contract, their liens are not discharged by section 67.[48] *Harris v. Hoffman*[49] held the *Hall* exception defined the scope of the *Lockwood* stay. Only waiver or contract creditors may have the discharge withheld for the purpose of obtaining a lien on the bankrupt's exempt property.

It is important to consider the trustee's right of lien preservation provided in section 67a (3).[50] This right places the trustee in competition with creditors and the bankrupt for exempt property. The trustee's fiduciary obligations to general creditors would seem to compel him to preserve liens whenever possible if the preservation would benefit general creditors. This is true regardless of the resulting detriment to individual creditors of the bankrupt. Preserving liens on exempt property will always benefit general creditors unless the cost of obtaining execution is prohibitive.

Assume a situation where the trustee has set off property to the bankrupt as exempt. Creditor *A* requests the final discharge be withheld so he may seek a state court judgment and lien on the property. The property is not exempt to him under state statute. Creditor *B*, to whom the property is also not exempt under state statute, holds a lien on the property. The lien was obtained by judicial proceedings within four months of the petition in bankruptcy. Because his lien is valueless to him, creditor *B* is also seeking a *Lockwood* stay to obtain a new lien. The trustee is seeking to preserve creditor *B's* lien, the only lien on the exempt property, for the benefit of general creditors. The bankrupt is attempting to have creditor *B's* lien discharged, prevent the trustee's preservation and prevent the stays requested by creditors *A* and *B*. The claim of each creditor is for 1,000 dollars, the value of the property.

It is evident from the facts that only one of the four parties

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47 *In re* Goldberg, 254 F. 440, 441 (E.D. Pa. 1918); Citizens Savings Bank v. Astrin, 44 Del. 451, 458, 61 A.2d 419, 422 (Super. Ct. 1948); Equitable Credit Co. v. Miller, 164 Ga. 49, 137 S.E. 771, 772-73 (1927); Dockery v. Flanary, 194 Va. 318, 73 S.E.2d 375 (1952).

48 *See* authorities cited *id.*

49 379 F.2d 413 (8th Cir. 1967).

50 *See* note 46 *supra* for text of § 67a (3). Section 67f included the trustee's right of lien preservation. Section 67a (3) retains this right in substantially the same language. The *Hall* decision was codified in the same section (67a (3)). Professor MacLachlan argues these facts indicate a legislative intent to subordinate the bankrupt's right of lien discharge to the trustee's right of lien preservation. J. MACLACHLAN, BANKRUPTCY § 209 at 230. *See* text accompanying notes 51-55 *infra.*

can succeed. In resolving such a dispute a court must first determine whether creditor *B's* lien will be preserved for the general creditors or will be discharged. Professor MacLachlan argues section 67 is a statute drawn for the benefit of general creditors and thus the trustees should always prevail over the bankrupt on the question of lien preservation.[51] His conclusion is sound only if one agrees with the premise that section 67 is drawn solely for the benefit of general creditors. But it is arguable the discharge of liens on exempt property is for the benefit of the bankrupt. The Court reasons in *Hall*:

> This property is withdrawn from the possession of the Trustee not for the purpose of being subjected to such liens, but on the supposition that it needed no protection in as much as they had been nullified.[52]

The protection provided by such nullification benefits the bankrupt. The court recognized section 67 as an attempt to provide equitable distribution of the bankrupt's assets by preservation of the status of creditors existing prior to their race of diligence. If liens on property are not discharged under section 67 grab law will prevail. If the race of diligence is concentrated upon exempt property alone, the footrace will not be appreciably slowed, and a somewhat limited number of participants will soon defeat all of the bankrupt's exemptions. *Hall,* in an attempt to prevent such a result, allowed discharge of liens on exempt property. The discharge in *Hall* was not an attempt to enable the trustee to preserve the liens, but rather was aimed at protecting the bankrupt.

MacLachlan's assertion also appears to be contrary to the purpose of providing the trustee with the right of lien preservation:

> [T]o allow the trustee to be subrogated . . . so that benefits intended for the estate by voiding a lien or transfer do not thereby become a windfall to a junior incumbrancer.[53]

A junior encumbrancer is one who is second in priority to a lienholder. Upon execution, distribution is made to the junior encumbrancer only after complete satisfaction of the senior claim. If the lien were discharged, the junior encumbrancer whose security interest is not discharged would be elevated to an undeserved priority. When the benefits of lien discharge are intended for the bankrupt, as in the case of exempt property, the purpose for preservation is not altered. In a case construing another lien preservation

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51 J. MACLACHLAN, BANKRUPTCY § 209 at 230.

52 Chicago B. & Q. R.R. v. Hall, 229 U.S. 511, 516 (1913).

53 Sears Roebuck & Co. v. Schulein, 282 F.2d 267, 271 (9th Cir. 1960).

section of the Bankruptcy Act,[54] the court noted:

> If . . . there had been a junior encumbrancer whose lien was not voidable as to the trustee there would be occasion for preservation.[55]

It thus appears a trustee may properly preserve liens on exempt property only where junior encumbrancers could remove that property from the bankruptcy.

The trustee's competition with creditors *A* and *B* and the bankrupt is thus limited. Since creditor *B* holds the only encumbrance on the exempt property, his lien cannot be preserved by the trustee. It will be discharged. The conflict among the remaining parties must now be resolved. Prior cases have allowed creditor *A* a stay in bankruptcy.[56] Apparently perceiving the inequity of disfavoring the more diligent creditor *B*, courts have also allowed him a stay.[57] This effectively defeats the bankrupt's exemption and the right of lien discharge given him in *Hall*. The error lies not in the perception that *A* should not be preferred over *B*, but in the conclusion that either must be preferred over the bankrupt.

The court in *Harris v. Hoffman*[58] indicates only waiver or contract creditors must be preferred over the bankrupt. Other constructions of *Hall* and *Lockwood* are possible. If all exemption statutes made property exempt from the attaching of a lien,[59] the only liens which could exist would be those whose holders are within exceptions to those exemptions. Thus, all valid existing liens would be executable under state law. But most exemption statutes provide specified property shall be exempt only from judicial sale, not from the attachment of liens.[60] Existing liens may be executable or unexecutable under such statutes. Holders of unexecutable liens await satisfaction from a future transferee of the property. It is arguable that while section 67 operates to discharge all liens obtained within the four month period, a *Lockwood* stay is permissible for any creditor who is able to obtain execution under state law. Thus, as a practical matter, section 67 would remove liens

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54 BANKRUPTCY ACT § 70e, 11 U.S.C. § 110 (1964).

55 *In re* Espelund, 181 F. Supp. 108, 115 (D. Wash. 1959).

56 *See* cases cited note 13 *supra*.

57 No federal cases have been found which have decided this precise question. McMains v. Cunningham, 214 Iowa 300, 242 N.W. 106 (1932), and Northern Shoe Co. v. Cecka, 22 N.D. 631, 135 N.W. 177 (1912), involve creditors seeking new liens because their prior liens were discharged. These creditors obviously had obtained stays.

58 379 F.2d 413 (8th Cir. 1967).

59 *See, e.g.*, MICH. STAT. ANN. § 27A.4031 (1961).

60 *See, e.g.*, IOWA CODE ANN. § 561.16 (1946).

which are unexecutable while the bankrupt has title to the property. This argument is less tenuous upon recollection that the *Lockwood* Court directed its stay provision to creditors having a remedy under the state law against the exempt property.[61] Such creditors are those who are within exceptions to the exemptions.

These creditors were not overlooked in *Hall*. The Court cited three cases including such creditors.[62] It certainly appears this larger and more obvious class of creditors would have been included in the *Hall* exception along with waiver and contract creditors if they were construed by the Court to be within the *Lockwood* rule.

The nature of the equity recognized in *Lockwood* as entitling the waiver holder to a stay must be examined. In a since overruled Ninth Circuit case, the court lamented the inequity of the *Lockwood* rule:

> To relegate the pre-existing creditors to the state courts is to ignore their rights in the . . . exemption and place them in a position where one [pre-existing] creditor, because of prompt action, might get all the . . . [exempt property] . . . to the exclusion of all other pre-existing creditors.
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> Such an unfair result is contrary to the policy of the Bankruptcy Act. Its policy is not to subject creditors to the haphazard chance of "grab law".[63]

The underlying theme of bankruptcy is that equality is equity.[64] Why the unique treatment of waiver and contract creditors?[65]

An exemption is personal to the bankrupt.[66] He may in some states waive the exemption in favor of one or all creditors[67] or he

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61 190 U.S. 294, 300 (1903).

62 *In re* Forbes, 186 F. 79 (9th Cir. 1911) (The creditor attached his lien prior to the bankrupt's declaration of homestead. Thus the creditor was within the statutory exception to the state exemption law); *In re* Driggs, 171 F. 897 (S.D. N.Y. 1909); *In re* Durham, 104 F. 231 (E.D. Ark. 1900).

63 England v. Sanderson, 236 F.2d 641, 643-44 (9th Cir. 1956), *overruled* on unrelated grounds in Lewis v. Manufacturers Nat'l Bank, 364 U.S. 603 (1961). For other criticism of *Lockwood see* Kennedy, *supra* note 2, at 462, Comment, 68 YALE L.J. 1459, 1477 (1959).

64 Levinthal, *The Early History of Bankruptcy Law*, 66 U. PA. L. REV. 223, 225, 235 (1918).

65 For a cogent criticism of special treatment for waiver holders and proposed legislation *see* Kennedy, *supra* note 2, at 467.

66 *In re* Blanchard & Howard, 161 F. 797 (E.D. N.C. 1908); *In re* Schuller, 108 F. 591, 592 (E.D. Wis. 1901).

67 GA. CODE ANN. § 51-1101 (1965); VA. CODE ANN. § 34-22 (1950); McCormick Harvesting Mach. Co. v. Vaughn, 130 Ala. 314, 317, 30 So. 363, 364 (1900); Opportunity B. & L. Assn. v. Silverman, 38 Pa. D. & C. 575, 576 (C.P. 1940). *See also* Comment, 68 YALE L.J. 1459, 1496 (1959), which proposes federal abolition of waivers in bankruptcy.

may assign it.[68] Those rights, where not abolished by state law, may be utilized by the debtor to bargain with his creditors prior to bankruptcy. The bankrupt receives something in return for their surrender. It is a denial of an obvious equity to prevent a creditor from asserting his claim where he has given value for a specific right in the property. The *Hoffman* court correctly suggests a bankrupt be estopped from avoiding a lien by means of discharge when he has issued a waiver note or has contractually assigned his exemption right to the lienholder.[69]

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68 *In re* National Grocer Co., 181 F. 33 (6th Cir. 1910); Lyle v. Roswell Store Inc., 187 Ga. 386, 200 S.E. 702 (1938).

69 Harris v. Hoffman, 379 F.2d 413, 417 (8th Cir. 1967). The theory of estoppel was suggested in Note, 40 VA. L. REV. 83 (1954). The conclusion Harris v. Hoffman is rightly decided assumes that *Lockwood* and *Hall* must be reconciled. The heavy limitation placed on *Lockwood* creates doubt concerning its vitality.

EVIDENCE—CREDIBILITY OF WITNESSES—PSYCHIATRIC EXAMINATION OF PRINCIPAL WITNESS IN MURDER TRIAL DENIED—*People v. Nash, 36 Ill.2d 275, 222 N.E.2d 473 (1966)*—A widely discussed evidentiary problem is the effect to be given the evergrowing body of knowledge in the field of psychiatry relating to the credibility of witnesses.[1] Courts have often admitted psychiatric testimony,[2] but have been reluctant to order a psychiatric examination of a witness.[3] *People v. Nash*[4] typifies the judicial system's hesitation. In *Nash*, the Circuit Court of Cook County, Illinois, refused to order a psychiatric examination of Triplett, the prosecution's principal witness, though the defendant, Nash, alleged that Triplett was a psychopath. On the basis of Triplett's testimony,[5] Nash was convicted of murder. The conviction was upheld by the Supreme Court of Illinois.[6]

The court apparently confused two issues in the case: (1) whether the psychiatric examination should have been ordered, and (2) whether the results of such an examination would have been admissible to aid the jury in determining Triplett's credibility. The court, in discussing the admissibility issue, stated psychiatrists were

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1 *See* Conrad, *Psychiatric Lie Detection*, 21 F.R.D. 199 (1958); Conrad, *Mental Examination of Witnesses*, 11 SYRACUSE L. REV. 149 (1960); Diamond & Louisell, *The Psychiatrist as an Expert Witness: Some Ruminations and Speculations*, 63 MICH. L. REV. 1335 (1965); Jones, *Admission of Psychiatric Testimony in Alger Hiss Trial*, 11 ALA. Lawyer 212 (1950); Juviler, *Psychiatric Opinions as to Credibility of Witnesses: A Suggested Approach*, 48 CALIF. L. REV. 648 (1960); Roch, *Truth-telling, Psychiatric Expert Testimony and the Impeachment of Witnesses*, 22 PENN. B. A. Q. 140 (1951); Slovenko, *Witnesses, Psychiatry and the Credibility of Testimony*, 19 U. FLA. L. REV. 1 (1966); Weihofen, *Testimonial Competence and Credibility*, 34 GEO. WASH. L. REV. 53 (1965); Comment, *Effect of Mental Deficiency on Competency and Credibility*, 36 MICH. L. REV. 818 (1938); Comment, *Psychiatric Testimony to Impeach the Credibility of a Witness*, 14 N.Y.U. INTRA. L. REV. 239 (1959); Note, *The Mentally Abnormal Witness: Challenges to His Competence and Credibility*, 13 RUTGERS L. REV. 330 (1958); Note, *Psychiatric Challenge of Witnesses*, 9 VAND. L. REV. 860 (1956); Note, *Psychiatric Evaluation of the Mentally Abnormal Witness*, 59 YALE L.J. 1324 (1950).

2 People v. Cowles, 246 Mich. 429, 224 N.W. 387 (1929); State v. Palmer, 206 Minn. 185, 288 N.W. 160 (1939); State v. Wesler, 1 N.J. 58, 61 A.2d 746 (1948); Aguilar v. State, 279 App. Div. 103, 108 N.Y.S.2d 456 (1951).

3 Wedmore v. State, 237 Ind. 212, 143 N.E.2d 649 (1957).

4 36 Ill.2d 275, 222 N.E.2d 473 (1966).

5 The only other evidence presented by the prosecution was testimony by a woman who saw Nash and Triplett across from the victim's office the day before the crime and certain real evidence which could not be connected to Nash without Triplett's testimony.

6 Constitutional issues were also raised in *Nash* relating to the state's obligation to provide an independent laboratory examination of physical evidence for the benefit of the defense. This issue forms the basis of an appeal to the United States Supreme Court.

in disagreement over the characteristics of a psychopathic personality.[7] Because of this disagreement, the court argued the results of such an examination would be of no probative value to the jury.[8] Therefore, the court concluded an examination should not have been ordered.[9] The court in effect ruled on the admissibility of evidence not yet produced and then used this ruling as a basis for not ordering an examination. A second reason advanced by the court for not allowing an examination was that an alternative method for impeaching Triplett was available.[10]

Ordering a psychiatric examination has gained greatest acceptance in the area of sex offenses.[11] If a defendant has been accused of a sex crime, such as rape, the victim of the alleged assault is often the only prosecution witness.[12] When the testimony of the victim is uncorroborated, her credibility while testifying is often the determinative issue in the case. As Wigmore has pointed out the victims of sexual assaults may often suffer from mental abnormalities which greatly affect credibility.[13] It has been argued that an examination of the victim should be ordered if reasonable grounds are shown for believing his credibility is affected by such an abnormality.[14]

Few courts have ordered a psychiatric examination of a witness in areas other than sex offenses. However, the facts in *State v. Butler*,[15] where an examination was ordered, are very similar to *Nash*. In *Butler*, the defendant was brought to trial for murder. Coleman, allegedly an accomplice to the crime, was charged separately. He became the state's principal witness in the trial of Butler. The defense produced records from a state mental institution which indicated Coleman's credibility might be affected by a mental abnormal-

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7 People v. Nash, 36 Ill.2d 275, 279, 222 N.E.2d 473, 475 (1966).

8 *Id.* at 279, 222 N.E.2d at 475.

9 *Id.* at 280, 222 N.E.2d at 476.

10 *Id.* at 280, 222 N.E.2d at 475.

11 C. McCORMICK, EVIDENCE, § 45 at 99 (1954).

12 26 IND. L.J. 98 (1950).

13 3 J. WIGMORE, EVIDENCE §§ 924a, 934a (3rd ed. 1940).

14 C. McCORMICK, EVIDENCE § 45, at 98 (1954); State v. Klueber, 132 N.W.2d 847 (S.D. Sup. Ct. 1965), where a psychiatric examination was ordered of a complaining witness in an indecent molestation case. *See* People v. Stice, 165 Cal. App. 2d. 287, 290, 331 P.2d 468, 470 (1958), where the court did not order an examination but stated it was within the discretion of the trial court to do so; 26 IND. L.J. 98 (1950).

15 27 N.J. 560, 143 A.2d 530 (1958), cited with approval in State v. Klueber, 132 N.W.2d 847, 850 (S.D. Sup. Ct. 1965); *see* Conrad, *Mental Examination of Witnesses*, 11 SYRACUSE L. REV. 149, 160 (1959), "Certainly State v. Butler is one of the evidential monuments of our times."; Note, *The Mentally Abnormal Witness: Challenges to His Competence and Credibility*, 13 RUTGERS L. REV. 330, 341, 342, 344 (1958).

ity.[16] Basing their request on these records, the defense moved that the court order a psychiatric examination of Coleman. The trial court denied the motion, Butler was convicted, and he appealed to the New Jersey Supreme Court, which held the trial court had inherent power to order a psychiatric examination of a witness "upon a substantial showing of need and justification."[17] The Court found such a showing had been made and reversed the lower court.[18]

In *Taborsky v. State*[19] the defendant was tried and convicted of murder. Before trial, the court denied defendant's motion for a psychiatric examination of the state's principal witness. After conviction, the defendant moved for a new trial on the ground of newly discovered evidence.[20] This motion was also denied. On appeal, the Supreme Court of Connecticut reversed stating a new trial should have been ordered on the ground of newly discovered evidence. The court commented that a psychiatric examination of the principal witness could have been ordered after he was called to testify.[21]

In *People v. Nash* the principal witness, Triplett, was called to testify by the prosecution. His credibility became a disputed issue in the case. Any evidence relating to his credibility was therefore relevant. The results of a psychiatric examination, if probative of Triplett's credibility, would have been admissible. The court in *Nash* should have first ruled on the question whether a psychiatric examination of Triplett should have been ordered then on the admissibility of the results after they were made available. The above cases indicate a number of factors, none of which were mentioned by the Illinois Supreme Court, which would have been valuable in deciding this question. It appears that substantial need and justification[22] exist at least when: (1) the defendant faces serious sanction if convicted; (2) conviction depends on the testimony of one

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16 Coleman was committed to the Crownsville State Hospital in Maryland from July 9 to September 5, 1954. In the report from that institution it was stated that Coleman "when confronted with unavoidable difficulties . . . may try to bluff through them . . . ." State v. Butler, 27 N.J. 560, 598, 143 A.2d 530, 552 (1958).

17 State v. Butler, 27 N.J. 560, 605, 143 A.2d 530, 556 (1958).

18 *Id.*

19 142 Conn. 619, 116 A.2d 433 (1955).

20 The newly discovered evidence was psychiatric testimony that the principal witness was a psychotic who could not tell the truth and had been suffering from this condition when he had testified.

21 Taborsky v. State, 142 Conn. 619, 630, 116 A.2d 433, 438 (1955).

22 State v. Butler, 27 N.J. 560, 605, 143 A.2d 530, 556 (1958).

witness; (3) the witness's testimony is uncorroborated[23]; and (4) the defense shows reasonable grounds for believing the witness' competence or credibility is questionable due to a mental abnormality.[24] When the jury must decide guilt or innocence on the basis of the witness' testimony alone, his credibility becomes the crucial issue in the case. If the witness does in fact suffer from a mental abnormality, especially if he is a pathological liar,[25] his credibility may be greatly affected by such a condition.[26] The jury, however, may be unable to evaluate his credibility. His demeanor on the stand will be of little help, for psychopathic personalities often appear quite normal.[27] Cross-examination may even be ineffective as a method of impeachment.[28] With no psychiatric evidence reflecting the witness' lack of credibility the jury is free to find the witness credible.[29] It seems manifestly unjust to allow conviction in a situation where the reliability of the witness is dubious, the jury's judgment of credibility based on tenuous grounds, and the impending sanctions against the defendant are great. When the above conditions are present an examination of the witness must be ordered by the court.[30] Failure

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23 The first three factors mentioned do not relate to the probativity of the examination but rather to the question whether a court should subject a noncooperative citizen to analysis assuming the probativity of the examination is already established. The purpose of this note is not to suggest that these are the correct standards. Some lesser standard might be used. However, the fact pattern in *Nash* satisfies even this strict standard with the only questionable issue being would the evidence gained from this examination be probative, and if so, did the defense present the court with reasonable grounds to believe it would be probative of the issue of Triplett's credibility.

24 The court in *Butler* mentions only ". . . substantial need and justification." But it emphasizes that this exists when the four conditions are present. State v. Butler, 27 N.J. 560, 605, 143 A.2d 530, 556 (1958).

25 *See* Note, *Psychiatric Evaluation of the Mentally Abnormal Witness*, 59 YALE L.J. 1324, 1330 (1950).

26 Karpman, *Lying: A Minor Inquiry into the Ethics of Neurotic and Psychopathic Behavior*, 40 J. CRIM. L.C. & P.S. 135, 153 (1949).

27 Weihofen, *Testimonial Competence and Credibility*, 34 GEO. WASH. L. REV. 53, 86 (1965).

28 Conrad, *Psychiatric Lie Detection*, 21 F.R.D. 199, 201 (1958).

29 Note, *Psychiatric Evaluation of the Mentally Abnormal Witness*, 59 YALE L.J. 1324, 1341 (1950):

> Without the benefit of psychiatric assistance a jury may of course make the proper evaluation of an abnormal witness' credibility. But its decision is at best an intuitive guess; good luck alone can make it correct.

30 State v. Butler, 27 N.J. 560, 143 A.2d 530 (1958). *See also* Conrad, *Psychiatric Lie Detection*, 21 F.R.D. 199 (1958); Conrad, *Mental Examination of Witnesses*, 11 SYRACUSE L. REV. 149 (1960); Note, *Psychiatric Examination of the Mentally Abnormal Witness*, 59 YALE L.J. 1324, 1339-40 (1950):

to order such an examination is an abuse of the court's discretion.[31]

In *Nash* the four conditions were present. The defendant was being tried for murder, a crime with the most serious of sanctions. Triplett's testimony was uncorroborated and was the only evidence which could connect Nash with the crime. The only questionable factor was whether the defense presented reasonable grounds for believing Triplett's credibility was affected by a mental abnormality. Attached to the petition requesting the court to order an examination was a letter from the Supervisor of Records for the State Prison of Southern Michigan where Triplett had been incarcerated during periods between 1942 and 1962.[32] The letter quoted a prison psychologist as stating that Triplett "gives me the impression as being a true psychopath . . . ."[33] The question remains: Was this sufficient evidence to cast Triplett's credibility in doubt?

As the *Nash* court noted, psychiatrists disagree over the characteristics of a psychopathic personality because the word "psychopath" is used to describe a great number of people with different personality characteristics.[34] This lack of agreement is not a valid reason for refusing to order a psychiatric examination because the general class of psychopaths may include people classified as pathological liars.[35] These people appear quite normal[36] and easily pass the traditional tests of competency.[37] But such a person's credibility

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> To provide juries with maximum psychiatric assistance, courts should order clinical examination of any witness by a court-appointed psychiatrist upon a reasonable showing that the witness may be suffering from a mental illness likely to affect his credibility.

For a contrary view *see* Leifer, *The Competence of the Psychiatrist to Assist in the Determination of Incompetency: A Sceptical Inquiry into the Courtroom Functions of Psychiatrists,* 14 SYRACUSE L. REV. 564 (1963).

31 It is generally held that a court has the power to order a psychiatric examination of a witness. This power may be exercised as a matter of the trial court's discretion. *See* Carrado v. United States, 210 F.2d 712 (D.C. Cir. 1954), *cert. denied,* 350 U.S. 938 (1956); People v. Stice, 165 Cal. App. 2d 287, 331 P.2d 468 (1958); Taborsky v. State, 142 Conn. 619, 116 A.2d 433 (1955); State v. Butler, 27 N.J. 560, 143 A.2d 530 (1958).

32 People v. Nash, 36 Ill.2d 275, 278-79, 222 N.E.2d 473, 475 (1966).

33 *Id.*

34 Note, *The Psychopathic Personality,* 10 RUTGERS L. REV. 425, 433, (1955):

> [T]his type of mental disorder has frequently been called a 'scrap basket' in which to cast all personalities of which there is any doubt regarding analysis. That the concept represents a distinct form or perhaps forms of mental abnormality, however, is not doubted.

35 Weihofen, *Testimonial Competence and Credibility,* 34 GEO. WASH. L. REV. 53, 86 (1965).

36 *Id.*

37 *Id.* at 68.

may be greatly affected by this condition.[38] The psychopath "is so utterly devoid of any sense of guilt, he feels justified in telling all sorts of lies to escape the consequences of his acts."[39]

> The Sociopath [psychopath][40] may harbor unconscious hostilities that lead to false accusations or biased testimony. He may crave the publicity that his accusations give him or, driven by unconscious motives, may indulge in repetitious lying which is wholly irrational and without any discernible end . . . . His lies, indeed, are often told with more conviction than normal persons show. Even when his lying is exposed, he is able to make quick adjustments and thoroughly mislead the layman . . . ."[41]

have ordered a psychiatric examination of Triplett for the purpose of determining whether he was in the class of psychopathic personalities whose disorder would affect either competency or credibility.

A secondary reason advanced by the court for not ordering an examination was that:

> The prison psychologist's letter[42] gave the court reasonable grounds to believe Triplett's credibility was in doubt. The trial court should

> It has always been permissible to show that a witness, including the accused in a criminal case, if he takes the stand, has a bad reputation for truth and veracity . . . . It would seem unnecessary to raise the issue of whether a witness is a psychopath, from which a jury could infer that he possesses the characteristic of untruthfulness, when direct evidence of a witness's reputation for truthfulness is admissible.[43]

The court in effect has ruled psychiatric evidence, as a means of impeachment, inadmissible if an alternative method of impeachment is available. This rationale has been strenuously criticized.[44] The far better reasoning is that of *State v. Armstrong*,[45] where the court stated any means of impeachment was permissible if the witness's

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38 Mack, *Forensic Psychiatry and the Witness—A Survey*, 7 CLEV.-MAR. L. REV. 302, 314 (1958), quoting H.S. Whiting, M.D. and psychiatrist, Connecticut State Hospital, Middletown, Connecticut: "Sociopaths [psychopaths] are so careless with the truth as to always be suspect."

39 Weihofen, *Testimonial Competence and Credibility*, 34 GEO. WASH. L. REV. 53, 86 (1965).

40 The terms sociopath and psychopath are synonymous, the former having gained more general usage.

41 Weihofen, *supra* note 39, at 86.

42 People v. Nash, 36 Ill.2d 275, 278-79, 222 N.E.2d 473, 475 (1966).

43 *Id.*

44 Weihofen, *Testimonial Competence and Credibility*, 34 GEO. WASH. L. REV. 53, 68 (1965).

45 232 N.C. 727, 62 S.E.2d 50 (1950).

credibility was the determinative issue in the case. The court asserted the law valued the direct over the indirect. Evidence showing the mental state of the witness was held direct while evidence of bad reputation for truth was indirect.[46] The conclusion was that evidence of the mental condition of a witness was admissible as a means to discredit him.

The *Nash* court's alternative method argument is further weakened by their refusal to order attendance of certain out-of-state witnesses though requested to do so by the defendant.[47] Nash and Triplett resided in Michigan. Nothing in the decision suggested that anyone in Illinois knew Triplett well enough to testify that he had a bad reputation for truth and veracity. Thus, the alternative suggested by the court was most likely not available to Nash.

The Illinois Supreme Court, without considering the factors relevant to ordering a psychiatric examination of a witness, ruled the results of such an examination inadmissible. Conditions necessitating an examination of the witness were present in *Nash*. The findings from a psychiatric examination of Triplett may have proven him to be a pathological liar and thereby affected the jury's determination of his credibility. Only after the results of such an examination were available to the court should it have dealt with their admissibility.[48]

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46 *Id.* at 728-29, 62 S.E.2d at 51.

47 People v. Nash, 36 Ill.2d 275, 281, 222 N.E.2d 473, 476 (1966).

48 The test generally used to determine the admissibility of psychiatric opinion is whether the techniques or theories upon which they are based have won general acceptance among scientists in the field.

Juviler, *Psychiatric Opinions as to Credibility of Witnesses: A Suggested Approach*, 48 CALIF. L. REV. 648, 658 (1960); *see* Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923); Weihofen, *Testimonial Competence and Credibility*, 34 GEO. WASH. L. REV. 53 70-71 (1965). This test may have been held to exclude testimony proving Triplett a psychopath. However, most courts which have faced the question have admitted such evidence. United States v. Hiss, 88 F. Supp. 559 (S.D.N.Y. 1950); Coffin v. Reichard, 148 F.2d 278 (6th Cir. 1945); People v. Bastian, 330 Mich. 457, 47 N.W.2d 692 (1951); State v. Wesler, 137 N.J.L. 311, 59 A.2d 834 (1948); Ellarson v. Ellarson, 198 App. Div. 103, 190 N.Y.S. 6 (1921); Bouldin v. State, 87 Tex. Crim. 419, 222 S.W. 555 (1920). *But see* Commonwealth v. Repyneck, 181 Pa. Super. 630, 124 A.2d 693 (1956). In *Nash* the important question is not whether the witness was a psychopath but whether he was a pathological liar. Any evidence which reflects a witness' untruthfulness should be submitted to the jury. They will be left with the ultimate determination of the witness' credibility. With improved procedure for examining the expert witness, the jury could hear the testimony, yet be shown that psychiatrists disagree over the effects of a psychopathic personality. *See* Dieden & Gasparich, *Psychiatric Evidence and Full Disclosure in the Criminal Trial*, 52 CALIF. L. REV. 543 (1964).

CRIMINAL LAW—EFFECTIVENESS OF APPOINTED COUNSEL—*Entsminger v. Iowa, 386 U.S. 748 (1967)*—Petitioner, who was represented at trial by a court-appointed attorney, was convicted of uttering a forged instrument. Shortly after the verdict was rendered, he requested the trial court to appoint different counsel to aid him in the preparation of a motion for a new trial. Counsel was appointed, the motion was prepared and filed, but the trial court overruled it. Upon application, the same attorney was appointed to represent the petitioner on appeal; counsel then prepared and filed a timely notice of appeal. Filing this notice of appeal entitled the petitioner to a review by the Supreme Court of Iowa based on a "clerk's transcript" which contained only the Information or Indictment, the Grand Jury minutes, the Bailiff's Oath, Statement and Instructions and various orders and judgment entries of the court. Such a transcript did not contain the transcript of evidence nor the briefs or argument of counsel. In order to perfect a plenary appeal, including the transcript of evidence, briefs and argument of counsel, notice must be filed. Upon the petitioner's request, his appointed counsel filed such notice which, even though filed late, was allowed by the Supreme Court of Iowa. For unexplained reasons, the court-appointed attorney failed to file the entire record of the trial, although it had been prepared by the state. Despite the petitioner's request that the court issue an order commanding the trial court to transmit the certified record for its consideration, the Supreme Court of Iowa, after reviewing only the "clerk's transcript" in accordance with Iowa law, affirmed the conviction.[1]

Granting certiorari, the United States Supreme Court, reversing the Iowa Supreme Court, concluded that "on the bare election of his appointed counsel . . . all hope of any adequate and effective appeal at all was taken from the petitioner."[2]

Whenever a reviewing court is presented with a fact situation such as the one involved in this case, it immediately encounters the obstacle raised by the presumption that the lower court is sufficiently competent to appoint and oversee the conduct of capable counsel for indigent defendants.[3] The fact that the Court was willing to override that presumption may indicate a further willingness on its part to set standards against which the conduct of attorneys may be measured. Although this case involved the question of the effectiveness of a court-appointed counsel on appeal, the problem is not limited to the appellate process. In order to do substantial jus-

1 — Iowa —, 137 N.W.2d 281 (1965).

2 386 U.S. 748, 750 (1967).

3 *See* Note, *Effective Assistance of Counsel*, 49 VA. L. REV. 1531, 1535 (1963).

tice, the requirements imposed on court-appointed counsel at the appellate level must be the same as those imposed at the trial and earlier.[4]

In the past, the Supreme Court has not established an operable standard by which to judge the effectiveness of counsel. Any standards which have been established have come from lower federal courts[5] or from state courts.[6] An attempt to derive any meaningful guidelines from these pronouncements is futile. Generally, these courts have only articulated empty phrases. For example, effective assistance of counsel has been defined as follows:

> [T]he services of counsel meet the requirements of the due process clause when he is a member in good standing at the bar, gives his client his complete loyalty, serves him in good faith to the best of his ability, and his service is of such a character as to preserve the essential integrity of the proceedings as a trial in a court of justice. He is not required to be infallible.[7]

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[4] *See generally* Waltz, *Inadequacy of Trial Defense as a Ground for Post-conviction Relief in Criminal Cases*, 59 NW. U. L. REV. 289 (1964).

[5] *See, e.g.*, Fields v. Petyon, 375 F.2d 624 (4th Cir. 1967) (counsel appointed fifteen or thirty minutes before trial advised client to plead guilty without questioning him as to his guilt of jailbreak and statutory burglary; held, defendant not afforded effective assistance of counsel); Schaber v. Maxwell, 348 F.2d 664 (6th Cir. 1965) (appointed counsel failed to file plea of insanity in writing as required by statute, causing defendant to be tried without the benefit of a defense to murder and robbery; ineffective assistance); DeRoche v. United States, 337 F.2d 606 (9th Cir. 1964) (two days to prepare defense to passing counterfeit coins; effective assistance); Mitchell v. United States, 259 F.2d 787 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958) (failure to move for acquital, to cross-examine, to object to hearsay evidence, and to object to a patently erroneous charge to jury; effective assistance); United States v. Wight, 176 F.2d 376 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950) (conferred fifteen minutes and advised defendant to plead guilty; effective assistance).

[6] *See, e.g.*, Oppenheimer v. Boies, 95 Ariz. 292, 389 P.2d 696 (1964) (appointed counsel assigned to defendant not satisfactory to him; no requirement to appoint counsel of defendant's choice); People v. Ibarra, 60 Cal. 2d 460, 386 P.2d 487 (1963) (counsel's failure to object to admission of evidence allegedly obtained as the result of an illegal search and seizure because of ignorance of rule of law; ineffective assistance); Commonwealth v. Drolet, 337 Mass. 396, 149 N.E.2d 616 (1958) (right to counsel not violated where defendant refused appointed counsel and participated actively in his own defense); State v. Rinaldi, 58 N.J. Super. 209, 156 A.2d 28 (1959) (no facts given in support of allegation of ineffectiveness); Commonwealth v. O'Keefe, 298 Pa. 169, 148 A. 73 (1929) (defendant tried and convicted on liquor charge within five hours of arrest over retained counsel's protest; not denied right to effective counsel).

[7] United States *ex. rel.* Weber v. Ragen, 176 F.2d 579, 586 (7th Cir. 1949), *cert. denied*, 338 U.S. 809 (1950).

So long as the attorney's performance was not so incompetent as to make the trial a sham, farce or mere pretense,[8] courts have generally considered accusations that the trial or appellate counsel was incompetent as apparitions of hindsight engendered from long hours spent in the prison's library or in comparing notes concerning what other prisoners' counsel did or did not do.[9]

Every court considering this problem has agreed that to be effective, counsel need not be successful,[10] nor must he have followed every possible avenue of defense.[11] The fact that he used improvident strategy, or made mistakes, or was careless and inexperienced does not necessarily amount to ineffective assistance of counsel.[12] This ill-defined standard, being an out-growth of the now discarded notion that the due process clause is violated only by conduct that shocks the conscience of the court, has not kept pace with judicial developments in other areas of criminal justice.[13]

From the beginning of our existence as a country, the assistance of counsel has been a cherished right.[14] The sentiment of our forebearers was expressed in the sixth amendment to the Constitution, providing:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

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8 Nutt v. United States, 335 F.2d 817 (10th Cir.), *cert. denied*, 379 U.S. 909 (1964) (failure to object to inadmissible evidence, to ask for restrictive instructions on certain affirmative defenses; effective assistance); Joseph v. United States, 321 F.2d 710 (9th Cir. 1963), *cert. denied*, 375 U.S. 977 (1964) (good discussion of how much time is enough in determining whether lack of time makes counsel ineffective).

9 *See* Waltz, *supra* note 4, at 290-291.

10 *See, e.g.*, Hester v. United States, 303 F.2d 47 (10th Cir.), *cert. denied*, 371 U.S. 847 (1962) (counsel failed to voice a single objection during course of trial proceedings; effective assistance in light of prosecution's careful and complete case); Holt v. United States, 303 F.2d 791 (8th Cir. 1962), *cert. denied*, 372 U.S. 970 (1963) (counsel present and available throughout trial, conferred with defendant before and during trial; defendant's unspecified charges unfounded and unjust).

11 United States *ex. rel.* Boucher v. Reincke, 341 F.2d 977 (2d Cir. 1965) (failure to bring up question of illegal search and seizure not ineffectiveness where defendant voluntarily pleaded guilty).

12 Edwards v. United States, 256 F.2d 707 (D.C. Cir.), *cert denied*, 358 U.S. 847 (1958) (counsel met once with defendant and advised him to plead guilty without arguing illegality of arrest or illegality of confession; effective assistance).

13 *Compare, e.g.*, Wolf v. Colorado, 338 U.S. 25 (1949) and Rochin v. California, 342 U.S. 165 (1952) *with* Mapp v. Ohio 367 U.S. 643 (1961), for rejection of the "shocks the conscience" test with regard to the admission of evidence resulting from an illegal search and seizure in a state criminal trial.

14 For an analysis of the status of the right to the assistance of counsel in the colonies *see* Note, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 YALE L.J. 1000, at 1030-34 (1964) [hereinafter cited as *Right to Counsel*].

The current line of Supreme Court cases dealing with the right to counsel begins with *Powell v. Alabama.*[15] In that case several young negroes were charged with the rape of two white girls. The trial judge appointed the entire local bar to defend them, and the defendants, with only a semblance of counsel, were tried speedily and convicted. The Supreme Court of Alabama, over a vigorous dissent, affirmed the conviction.[16] In reversing the conviction, the Supreme Court recognized the need of an accused defendant for the "guiding hand of counsel at every stage in the proceedings against him."[17] Continuing, the Court stressed that the duty to appoint counsel is not discharged "at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."[18] Concluding, the Court declared:

> The failure of the trial court to make an *effective* appointment of counsel was . . . a denial of due process within the meaning of the Fourteenth Amendment.[19]

The standard established by *Powell,* and its progeny,[20] requiring effective appointment of counsel, necessitated appointment early enough to enable the lawyer to assist the accused in preparing a meaningful defense.[21] Although it is generally conceded that early appointment of counsel is necessary for the preparation of a meaningful defense, there is a controversy as to when the appointment should be required.[22] Arguably, the time when a defendant needs

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15 287 U.S. 45 (1932).

16 224 Ala. 524, 141 So. 195 (1932).

17 287 U.S. 45, 69 (1932).

18 *Id.* at 71.

19 *Id.* (Emphasis added.)

20 *See generally* E. CHEATHEM, A LAWYER WHEN NEEDED 10 ff. (1963); Note, *Incompetency of Counsel as a Ground for Attacking Criminal Convictions in California and Federal Courts,* 4 U.C.L.A. L. REV. 400 (1957). Miranda v. Arizona, 384 U.S. 436 (1966) (made it clear that the requirement of the guiding hand of counsel at any critical stage referred not only to retained counsel, but also to counsel provided for indigent defendants); Escobedo v. Illinois, 378 U.S. 478 (1964) (requires practical approach in determining whether the guiding hand of counsel is necessary); White v. Maryland, 373 U.S. 59 (1963) (counsel required at any preliminary state of prosecution which may be or is a "critical stage"); Gideon v. Wainright, 372 U.S. 335 (1963) (struck down the "special circumstances" test of Betts); Betts v. Brady, 316 U.S. 455 (1942) (applied right to counsel to states under a "special circumstances" test); Johnson v. Zerbst, 304 U.S. 458 (1938) (extended Powell to noncapital cases but only applied to federal criminal cases).

21 Herman, *The Supreme Court and Restrictions on Police Interrogation,* 25 OHIO ST. L.J. 449, at 486 (1964).

22 L. SILVERSTEIN, 1 DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS: NATIONAL REPORT 83 (1964) [hereinafter cited as DEFENSE OF THE POOR].

counsel most is immediately after his arrest and until trial.[23] Unless counsel is provided then, the most illustrious counsel practicing before the bar could not overcome the accumulated evidence marshalled against the defendant at trial.[24]

There is a danger inherent in our system of criminal justice that a critical confrontation by the prosecution at the pretrial proceedings might result in a pre-determination of guilt and reduce the trial to a mere formality.[25] If counsel is provided as soon as the investigation focuses on the accused, criminal defendants will be relieved, to some extent, of the original unfairness of the balance of the state against the individual and any inherent danger will be lessened.[26] By following this procedure, the lawyer would be available to explain the charge, to investigate the facts, and to prevent unreasonable detention and unjustified bail.[27]

In such an ideal system, counsel not only serves the function of providing technical aid, but he also acts as a needed buffer at the point of confrontation between the state and the accused.[28] The effectiveness of this appointment must carry through to the appellate level in the event of conviction.[29] In order to maintain the effectiveness of the appointment, the appointed attorney should assist in connection with sentencing and advise whether an appeal is justified in the circumstances.[30]

Having thus arrived at the point where counsel is required to be effectively appointed for indigents in both federal and state criminal prosecutions, it would seem that little more can be done to guarantee the exercise of the right to counsel. But, unless the counsel so appointed is effective and competent, the appointment itself is a useless formality.[31] Implicitly recognizing this, the decision in *Entsminger* adds to the *Powell* requirement of effective appointment

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23 A SPECIAL COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AND THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, EQUAL JUSTICE FOR THE ACCUSED 60 (1959) [hereinafter cited as EQUAL JUSTICE].

24 *See Ex parte* Sullivan, 107 F. Supp. 514 (D. Utah 1952).

25 *See* United States v. Wade, 388 U.S. 218, 224 (1967).

26 *See Right to Counsel, supra* note 14, at 1034.

27 EQUAL JUSTICE at 23. Concerning the problem of unjustified bail, *see also* Segal, *Some Procedural and Strategic Inequities in Defending the Indigent*, 51 A.B.A.J. 1165 (1965).

28 *Right to Counsel* at 1048.

29 The right to counsel on appeal has been guaranteed to indigent defendants by Douglas v. California, 372 U.S. 353 (1963) and Griffin v. Illinois, 351 U.S. 12 (1956).

30 EQUAL JUSTICE at 24.

31 Cullins v. Crouse, 348 F.2d 887 (10th Cir. 1965).

of counsel the further requirement of appointment of effective counsel. These two requirements are so intertwined that there may be little practical difference when viewed through the eyes of the convicted defendant. They may be distinguished, however, in that effective appointment of counsel concerns the opportunity of the court-appointed attorney to aid in preparing a meaningful defense, while the appointment of effective counsel deals with the problem of what the appointed counsel does or is capable of doing in preparing a defense when given the opportunity.[32] Canon 5 of the Canons of Professional Ethics states that

> the lawyer is bound by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law.

Notwithstanding this, studies indicate that many defendants are not getting the advantage of effective counsel under current systems of providing counsel.[33]

In light of this state of affairs the *Entsminger* decision can be considered to be a harbinger of higher standards in relation to the effective functioning of counsel defending criminal defendants. Granting that it is difficult to express in any given formulation of words standards by which counsel for criminal defendants can measure their actions and capabilities, an attempt will be made to delineate the boundary below which counsel's conduct should not fall and still be considered effective.

Of course, the standard could not be that the indigent defendant is entitled to the best counsel that money can buy. Even if this standard were practical, it would, at times, result in a situation analogous to calling in a brain surgeon to remove a splinter from an indigent patient's finger.[34] At the other extreme, the minimum standard of ability should not be that the attorney in question has passed the bar examination.[35] Admission to the bar does not by itself qualify a lawyer to provide effective representation to an indigent defendant. The role of the young lawyer recently admitted to the bar or of the capable real estate or corporation lawyer, who is unfamiliar with criminal practice, should be limited to that of as-

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32 For an exposition of the problems facing a public defender *see* Lewis v. Henderson, 381 F.2d 523 (6th Cir. 1967).

33 DEFENSE OF THE POOR, *supra* note 22; EQUAL JUSTICE, *supra* note 23.

34 *See* DEFENSE OF THE POOR at 17.

35 *But see* United States *ex. rel.* Weber v. Ragen, 176 F.2d 579 (7th Cir. 1949), *cert. denied*, 338 U.S. 809 (1950) holding that membership in the bar is prima facie evidence of competence.

sistant counsel appointed with a properly qualified lawyer.[36] In this way, willing but incompetent lawyers (because of unfamiliarity with criminal practice) may be trained in order to take a portion of the burden off their brethren who meet the established standard of competence.[37]

Somewhere between these two extremes is a minimum boundary line of competence below which an attorney may not fall and still be considered effective counsel. The applicable standard of ability connotes the appointment of a lawyer, who is known and respected by judge and prosecutor, with at least moderate experience in *criminal* court.[38]

Even after the hurdle of appointing counsel who meets the capability standard is surmounted, there is still another facet of effective assistance which must be considered. Not only must we have counsel reasonably likely to render effective assistance, we must also have counsel rendering reasonably effective assistance.[39] In order to determine the effectiveness of counsel's conduct of a case, the current standard labeling ineffective assistance only that conduct which shocks the conscience of the court[40] should be supplanted by a higher standard, at least that which applies to an attorney faced with malpractice in the civil courts.

The civil standard is variously stated but is typified by the statement in *Hodges v. Carter*,[41] that a lawyer

> is answerable in damages for any loss to his client which proximately results from a want of that degree of knowledge and skill ordinarily possessed by others of his profession similarly situated, or from the omission to use reasonable care and diligence, or from failure to exercise in good faith his best judgment in attending to the litigation committed to his care.[42]

If it is not necessary for the jury's conscience to be shocked to award damages where an attorney negligently draws a will, how can we justify such a requirement (*i.e.*, that the conduct of the trial shocks the reviewing court's conscience) when we are concerned with taking away a criminal defendant's freedom?

Throughout the proceedings against a criminal defendant, re-

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36 *See* DEFENSE OF THE POOR at 17-18.

37 *Id.* at 18.

38 *Id.*

39 Brooks v. Texas, 381 F.2d 619, 625 (5th Cir. 1967).

40 *See supra* notes 5-8 and 13 and accompanying text.

41 239 N.C. 517, 80 S.E.2d 144 (1954).

42 *Id.* at 519, 80 S.E.2d at 146. *See generally* Wade, *The Attorney's Liability for Negligence*, in PROFESSIONAL NEGLIGENCE 217 (T. Roady & W. Anderson ed. 1960).

gardless of whether they take place before or after trial, the attorney must function as an active advocate, not merely as amicus curia.[43] Without such functioning, all other rules established are meaningless. Without such functioning, the adversary system will not be able to perform its basic purpose of determining the truth.[44]

Heretofore, the courts, when passing on the problem of appointed counsel, have dealt primarily with the form or effectiveness of the *appointment* of counsel. Guidelines or standards for making *counsel* more effective are still woefully lacking, but in light of the Court's decision in *Entsminger,* they may be forthcoming in the near future.

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43 Anders v. California, 386 U.S. 738 (1967).

44 Tehan v. United States ex. rel. Schott, 382 U.S. 406 (1965).

TAXATION—USE TAXES ON INTERSTATE SALES—MAIL-ORDER FIRMS FREED FROM COLLECTING USE TAX—*National Bellas Hess, Inc. v. Department of Rev. of State of Ill., 386 U.S. 753 (1967)*—The attempt by states to require foreign corporations to collect use taxes has been seriously burdening interstate commerce. This was the conclusion of the United States Supreme Court in *National Bellas Hess, Inc., v. Department of Rev. of State of Ill.*,[1] which arose under the following facts. National Bellas Hess, Inc., a Delaware corporation, operates a national mail-order house located in Missouri. The company mails two catalogues a year and several flyers to a customer list of over five million names. Its only plant is in Missouri where all orders are accepted and then sent to the customers by mail or common carriers. This corporation has no office, warehouse, distribution point or property in Illinois. It has no salesmen, or other representatives in Illinois and does not advertise in newspapers, on bill boards or by radio or television in Illinois. It solicits only by mailed catalogues and flyers. The company sold over two million dollars in merchandise to Illinois residents over a fifteen month period. The Department of Revenue of the State of Illinois claimed National Bellas Hess was liable for the use tax which it should have collected from Illinois residents in the amount of 75,000 dollars plus a penalty.[2] The company was held liable for the tax in the Illinois courts[3] and appealed to the United States Supreme Court. Reversing the state court's decision, the court held the contacts fell short of the constitutional requirement of "some definite link, some minimum connection, between State and person, property, or transaction it seeks to tax". Therefore, the tax violated the due process clause and the commerce clause of the United States Constitution.[4]

The test used for determining the power of a state to impose the burden of collecting use taxes upon interstate sales was whether the out-of-state company had retail outlets, solicitors or property within the taxing state. The majority, in applying this test, repudiated the view of the dissent that the test should be whether the out-of-state company was engaged in exploiting the local market on a regular, systematic, large-scale basis.[5] The criterion for the

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1 386 U.S. 753 (1967).

2 ILL. REV. STAT. ch. 120, § 439.3 (1965).

3 National Bellas Hess, Inc. v. Department of Rev. of State of Ill., 34 Ill.2d 164, 214 N.E.2d 755 (1966).

4 National Bellas Hess, Inc. v. Department of Rev. of State of Ill., 386 U.S. 753 (1967) [hereinafter referred to as *National*].

5 *Id.* at 765-66.

majority's test is "physical presence";[6] the dissent's test would be "economic exploitation."

The decision in *National* stemmed the trend of an ever-widening tax burden imposed by states on out-of-state sellers.[7] Thirty years of history precedes the Supreme Court's decision in *National*. In 1939, the Supreme Court upheld a California statute requiring an out-of-state seller to collect the use tax on goods shipped into the state. The out-of-state seller maintained sales agents within the state.[8] Two years later in two cases arising in Iowa, the Supreme Court upheld Iowa's demand that Sears, Roebuck and Montgomery Ward collect the use tax on catalogue sales to Iowa residents. Both companies also maintained retail stores in the state.[9] In 1944, the Supreme Court in *General Trading Co. v. State Tax Comm'n*[10] upheld the Iowa statute against the challenge of an out-of-state mail order company which sent traveling salesmen into the state to solicit orders. In *Miller Brothers Co. v. Maryland*,[11] the next important case, a Delaware furniture store had many Maryland customers who were advised of its wares through advertising in Delaware newspapers which circulated in Maryland and through flyers sent to Maryland customers. Miller Brothers took no mail or phone orders. Maryland customers made their purchases in Delaware, and Miller Brothers occasionally delivered the furniture to Maryland in its own trucks. In a five-four decision, the Supreme Court held that Maryland could not make Miller Brothers collect the Maryland use tax from Maryland customers because there was not a sufficient nexus between Maryland and the Delaware store. The four dissenting justices thought that advertising coupled with delivery was sufficient contact to sustain a duty to collect the use tax. In *Scripto, Inc. v. Carson*,[12] the most recent case, a Georgia

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6 This test announced in *National* represents a precise standard for the traditional "minimum connections" test. Prior cases held the minimum connections could be provided by traveling salesmen, local agents, retail stores and independent brokers, not by undirected newspaper advertising and occasional delivery of goods. But beyond these fundamental principles the status of the law remained unclear until *National*.

7 As of 1965, local sales taxes were imposed by over 2,300 localities. In most states, the local sales tax is complemented by a use tax. H.R. REP. No. 565, 89th Cong., 1st Sess. 872 (1965).

8 Felt & Tarrant Manufacturing Co. v. Gallagher, 306 U.S. 62 (1939).

9 Nelson v. Montgomery Ward & Co., 312 U.S. 373 (1941). Nelson v. Sears, Roebuck & Co., 312 U.S. 359 (1941).

10 322 U.S. 335 (1944).

11 347 U.S. 340 (1954).

12 362 U.S. 207 (1960).

seller's orders were solicited in Florida by independent contractors who were neither agents nor employees of the seller. The independent contractors had designated territories, worked on commission and solicited orders for Scripto. The orders were accepted and shipped from the seller's office in Georgia. The Supreme Court found the solicitors were "independent contractors" and the company had no other contact with Florida, yet held against the taxpayer.

This was the background of *National.* Highlighting this development was the obvious tendency of the Supreme Court to cut down the immunity afforded by both the due process clause and the commerce clause and to extend the area in which a state has jurisdiction to compel an out-of-state seller to collect its use tax. According to *Nelson v. Sears, Roebuck & Co.*[13], the maintenance of a place of business such as a store, office, warehouse or display room clearly established such jurisdiction, even though the sales on which the use tax was imposed were made independent of the in-state place of business. *General Trading* extended this jurisdiction to situations where there was continuous, routine, solicitation by traveling salesmen of the seller who maintained no place of business within the taxing state. *Scripto* further extended it to a situation where the solicitation was undertaken by independent wholesalers or jobbers, although the taxpayer had neither a place of business nor any agents in the state. The only case in which the Supreme Court refused to extend this jurisdiction was *Miller Brothers,* where the Court held that undirected newspaper advertising and delivery of goods was not a sufficient nexus to give jurisdiction.

National reversed this definite trend toward expansion of state taxing power by drawing a line beyond which a state could not go. As the Court stated:

> In order to uphold the power of Illinois to impose use tax burdens on National in this case, we would have to repudiate totally the sharp distinction which [had been drawn] between mail order sellers with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business.[14]

[13] 312 U.S. 359 (1941).

[14] *National,* 386 U.S. 753, 758 (1967). Contrary to what the majority seems to be saying here, prior cases had not made a sharp distinction between mail order sellers with retail outlets and solicitors within a state, and those who do no more than communicate with customers in the state by mail or common carrier. Although the decision in Nelson v. Sears, Roebuck & Co., 312 U.S. 359 (1941), seemed to imply that the use tax was sustained only because the mail-order company also engaged in retail selling in the taxing state, the Court in General Trading Co. v. State Tax

The line was drawn at some physical nexus or presence within the taxing state.

The decision in *National* is also significant for another reason; it signalled the return of the commerce clause as a viable issue in the area of use taxes on interstate sales. With the decision in *General Trading* some twenty-three years ago, it became evident that the immunity imposed by the commerce clause in this area was dwindling. The spread of use taxes was making the interstate commerce restriction a moot question.[15] The sellers liability for collection of the use tax became mainly a question of "jurisdiction",[16] with due process the only meaningful constitutional issue. But the spread of use taxes created a new problem for the out-of-state sellers who were required to collect the taxes.[17] This problem was the additional and prohibitive costs of complying with numerous use tax statutes with different rates, exemptions, and record-keeping requirements.[18] A substantial burden was being placed on the out-of-state seller which was not being borne by an intrastate seller. Thus a new aspect of the commerce clause issue arose—whether the costs and mechanics of compliance with the rules of multiple jurisdictions could be regarded as burdening interstate commerce.

The Court in *National* recognized this issue.[19] As Justice Stewart, writing for the majority, said:

> And if the power of Illinois to impose use tax burdens upon National were upheld, the resulting impediments upon the free

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Comm'n, 322 U.S. 335 (1944), characterized the presence of the retail stores in *Nelson* as being "constitutionally irrelevant" to the right of the state to collect its tax. The question, whether or not foreign corporations engaged *only* in mail order sales would be required to collect the use tax was undecided until this decision.

15 *See* General Trading Co. v. State Tax Comm'n, 322 U.S. 335 (1944). The earlier appeal of *General Trading* was founded on the commerce clause. The decision of the Supreme Court in *General Trading* settled the question of taxability of a seller with salesmen in the State. In the *Scripto* case, the Court held that the activity of *any* selling representative in the State eliminated the tax immunity provided by the commerce clause.

16 *See id.* at 338; *see* Reichman-Crosby Co. v. Stone, 204 Miss. 122, 155, 37 So.2d 22, 27 (1948).

17 As of 1965, local sales taxes were imposed by over 2,300 localities. In most States, the local sales tax is complemented by a use tax. H.R. REP. No. 565, 89th Cong., 1st Sess. 872 (1965).

18 In 1964 there were seven different rates of sales and use taxes: 2, 2¼, 2½, 3, 3½, 4, and 5%. H.R. REP. No. 565, 89th Cong., 1st Sess. 872, at 611-13, 607-608 (1965). The State of Washington has recently added an eighth, 4.5%. WASH. REV. CODE ANN. § 82.12.020 (Supp. 1967).

19 The issue was extensively argued in the brief for appellant. *See generally,* Brief for Appellant at 22, 55, *National,* 386 U.S. 753 (1967).

> conduct of its interstate business would be neither imaginary nor remote. For if Illinois can impose such burdens, so can every other state and so, indeed, can every municipality, every school district, and every other political subdivision throughout the Nation with the power to impose sales and use taxes. The many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle National's interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose 'a fair share of the cost of local government.'[20] [Footnotes omitted.]

Justice Stewart was not alluding to the absence of due process but was clearly recognizing a new aspect of the commerce clause issue.

In view of this recognition in *National* of the commerce clause issue, the conclusion can only be that the "physical presence" test is not solely a due process test, but a test which takes into consideration the restrictions of both the due process and commerce clauses. Support for this conclusion can be gathered from a reading of the text of the decision. Justice Stewart recognized only one applicable test for determining the power of a state to impose the burdens of collecting use taxes upon interstate sales, the "minimum connections" test. But, while recognizing only one applicable test, Justice Stewart pointed out at the beginning of the opinion that National Bellas Hess was claiming a violation of both the due process and commerce clauses. Justice Stewart characterized this as a *constitutional* test, not simply a due process or a commerce clause test.[21] Justice Stewart's statements indicate the "physical presence" test will be determinative of whether there is a violation of due process or an undue burden on interstate commerce.

Clearly, the "physical presence" test is not merely a due process test. Requiring physical presence before jurisdiction attaches is unjustifiable as explained by the Court's opinion in *McGee v. International Life Ins. Co.*[22]

> Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today, many commercial transactions touch two or more States and may in-

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20 *National*, 386 U.S. 753, 759-60 (1960).

21 In the *Miller* case, on the contrary, the Court characterized the "minimum connections" test as solely a "due process" test. *See* Miller Bros. Co. v. Maryland, 347 U.S. 340, 344-45 (1954).

22 355 U.S. 220, 222-23 (1957).

> volve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a state where he engages in economic activity.

If the majority's "physical presence" test merely relates to due process then the dissent in *National* had a valid point when it concluded that the large-scale, systematic, continuous solicitation and exploitation of the Illinois consumer market by National Bellas Hess provides a sufficient "nexus" to require it to collect the use tax.[23] Contemporary advertising techniques justify a jurisdictional basis less restrictive than physical presence.

Treating "physical presence" as a due process test alone is unrealistic. But when the restrictions of the commerce clause are considered the test works admirably toward solving the complicated problems present in the area of use taxes on interstate sales. Although the realities of contemporary advertising techniques call for an increase in the power of the states to make out-of-state sellers collect their use taxes, the ever-increasing burden being placed on these out-of-state sellers has adversely affected interstate commerce.[24] The line drawn by the "physical presence" test represents a balance between these conflicting interests. The "physical presence" test will tend to reduce the number of states for which any given out-of-state seller must collect taxes, thereby reducing the costs of compliance for out-of-state sellers. Those out-of-state sellers who do business in a multitude of states, although not physically present in the states, will be immune from the necessity of collecting taxes. But those out-of-state sellers who have property, salesmen or agents in the taxing state will still be required to collect the use tax. The "physical presence" test is conclusive evidence that commerce clause considerations have once again entered the area of use taxes on interstate sales.

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23 *National*, 386 U.S. 753, 761-62 (1967).

24 The prevailing system requires [the seller] to administer rules which differ from one State to another and whose application—especially for the industrial retailer—turns on facts which are often too remote and uncertain for the level of accuracy demanded by the prescribed system.

H.R. REP. No. 565, 89th Cong., 1st Sess. 872 at 673 (1965).

> Given the broad spread of sales of even small and moderate sized companies, it is clear that if just the localities which now impose the tax were to realize anything like their potential of out-of-state registrants the record-keeping task of multistate sellers would be clearly intolerable.

H.R. REP. No. 565, 89th Cong., 1st Sess. 872, at 882. (1965).

The Supreme Court has not been the only governmental branch which has recognized that the costs and mechanics of compliance with the rules of multiple jurisdictions could be burdening interstate commerce. In 1959, Congress passed legislation creating a House Special Sub-Committee On State Taxation of Interstate Commerce.[25] After the decision in *Scripto,* which further expanded the power of the states to impose use taxes on out-of-state sellers, the Committee study was expanded to include sales and use taxes. The Committee concluded that state taxation of multi-state business operations had become so burdensome that the "common market" of our fifty-state federation had been seriously threatened.[26] Congressional action was inevitable.

The Interstate Tax Act[27] is a bill designed to foster commerce among the states by providing for systematic regulation of taxation of interstate commerce. The section of the bill dealing with state sales and use taxes primarily addresses itself to abuses resulting from the many variations in taxes and collecting criteria in the various states. In addition, the bill is concerned with the failure of states to provide an off-set credit provision to eliminate possible multiple taxation. The bill establishes a uniform jurisdictional standard for state or local taxation. In regard to use taxes, it provides that no state or political subdivision thereof shall have the power to require a person to collect a sales or use tax with respect to a sale of tangible personal property unless, (1) the person has a business location in the state, or (2) the person regularly makes household deliveries in the state.[28] The bill defines "having a business location in the state" as (1) owning or leasing real property within the state, (2) having one or more employees located in the state, or (3) regularly maintaining a stock of tangible personal property in the state for sale in the ordinary course of business.[29] The bill further provides that an employee shall not be considered to be located in a state if his only business activities within such state on behalf of his employers are (1) the solicitation of orders which are sent outside the state for approval or rejection and filled by shipment or delivery from a point outside the state, or (2) the solicitation of orders in the name of or for the benefit of a prospective customer of his employer.[30]

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25 15 U.S.C. § 381 (1959).

26 *See* H.R. REP. No. 565, 89th Cong., 1st Sess. 872 (1965); H.R. REP. No. 2013, 89th Cong., 2d Sess. (1966).

27 H.R. 2158, 90th Cong., 1st Sess. (1967).

28 *Id.* § 101.

29 *Id.* § 511.

30 *Id.* § 513(d).

The foregoing jurisdictional standards in the bill are nothing more than different manisfestations of the "physical presence" test announced in *National.* They too will tend to reduce the number of states for which any given out-of-state seller must collect use taxes, thereby reducing such seller's tax burden and freeing interstate commerce. The bill also supports the holding in *National* in that an out-of-state mail-order firm not physically present in the taxing state would be immune from taxation. However, it would negate the result of the Court's decision in *General Trading*[31] and *Scripto*[32] because under its provisions out-of-state sellers who solicit orders through employee salesmen or independent sales representatives are expressly exempted from collecting out-of-state use taxes.[33]

The *National* case indicates the Court's approval of a bill like the Interstate Tax Act both practically and constitutionally. The majority in *National* was emphatic in warning of the dangers to the free play of interstate commerce that would result if National Bellas Hess was required to collect use taxes for every jurisdiction into which its goods were shipped. Furthermore, the court notes that Congress has evidenced interest in this area and that it favors such congressional action.[34] The conclusion can only be that the majority in *National* was paving the way for congressional entrance into the area.

Prior congressional action also supports the constitutionality of the Interstate Tax Act. In 1959, Congress enacted the Interstate Income Law[35] which forbade the states to levy an income tax on a foreign corporation whose only jurisdictional contact with the state was the solicitation of interstate orders by traveling salesmen.[36] Congress was attempting to protect foreign corporations engaged in interstate commerce from state income taxes which it believed were excessive and unreasonable burden on interstate commerce.

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31 General Trading Co. v. State Tax Comm'n, 322 U.S. 335 (1944).

32 Scripto, Inc. v. Carson, 362 U.S. 207 (1960).

33 H.R. 2158, 90th Cong., 2d Sess., § 513(d) (1967).

34 *National,* 386 U.S. at 760 n. 15 (1967).

35 15 U.S.C. §381 (1964). This legislation represents Congress' reaction to the Supreme Court's decision in Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959), which held net income from exclusively interstate operations of a foreign corporation may be subjected to state taxation, provided the levy is not discriminatory and is properly apportioned to local activities within the taxing state forming sufficient nexus to support the same.

36 The jurisdictional standards used in the Interstate Income Law are identical to those proposed in the Interstate Tax Act.

In three cases[37], highest state courts have upheld the Interstate Income Law against allegations that Congress lacked power under the commerce clause to forbid such taxation. In one case the court stated the motive and purpose of the regulation of interstate commerce are matters of unrestricted legislative judgment over which the courts are given no control.[38] In another case the court traced the judicial history of the power of Congress to regulate interstate commerce, citing numerous instances where the Supreme Court had specifically recognized that this power extends into the area of state and local taxation, and concluded that the Interstate Income Law was a proper exercise of Congress' constitutional authority.[39]

These arguments supporting the constitutional validity of the Interstate Income Law are sufficiently broad to support the constitutional validity of the Interstate Tax Act. If the Interstate Income Law is constitutional, it would appear that the restrictive regulations imposed by the Interstate Tax Act would also be constitutionally sound.[40]

Prospects for passage of the bill seem fair, since this is the first time that such a bill has reached the point of being reported out of committee.[41] But there has been considerable state opposition to federal legislation in this area. The decision in *National* and the congressional attempt to legislate in the area of use taxes on interstate sales are commendable. The existing multi-state system of taxation is so complex, confusing, unfair, and intolerable that uniform legislation is necessary to preserve the common market of our Nation.

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37 International Shoe Company v. Cocreham, 246 La. 244, 164 So.2d 314, *cert. denied*, 379 U.S. 902 (1964); Smith, Kline & French Laboratories v. State Tax Comm'n, 241 Or. 50, 403 P.2d 375 (1965); State *ex rel.* CIBA Pharmaceutical Prod., Inc. v. State Tax Comm'n, 382 S.W.2d 645 (Mo. Sup. Ct. 1964).

38 *See* State *ex rel.* CIBA Pharmaceutical Prod., Inc. v. State Tax Comm'n, 382 S.D.2d 645, 657 (Mo. Sup. Ct., 1964).

39 International Shoe Co. v. Cocreham, 246 La. 244, 258, 164 So.2d 314, 319 (1964).

40 The Supreme Court has not yet affirmatively ruled on the constitutionality of the Interstate Income Law, denying certiorari in the *International Shoe Co.* case.

41 Two bills preceded the present bill, H.R. 11798 and H.R. 16491, but neither was reported out of committee.

LABOR—SUBSTANTIAL EVIDENCE RULE AS APPLIED TO EMPLOYER FREE SPEECH CASE—*NLRB v. Hobart Bros Co., 372 F.2d 203 (6th Cir. 1967)*—During a union[1] organizational campaign at Hobart Brothers Company the Union sent authorization cards to approximately one-half of Hobart's employees, pledging that the cards would be treated confidentially. President Hobart sent a letter to all of his employees shortly thereafter informing them that the cards would not be confidential, and advising his employees not to sign anything without first considering the consequences. The NLRB[2] adopted the findings of the Trial Examiner that the letter amounted to a threat of reprisal for union activity in violation of section 8 (a) (1) of the National Labor Relations Act.[3] The Sixth Circuit Court of Appeals overruled the Board, stating that the Board's conclusion was not supported by substantial evidence, looking at the record as a whole.

Hobart Brothers is a leading manufacturer of welding equipment and is located in Troy, Ohio. The Union sent the authorization cards to 300-350 employees of Hobart in hopes of getting enough signatures to convince the NLRB that an election was desired. President Hobart's letter, written to all 600 employees, began by reminding the employees of the benefits they had received without a union and advising them that several of their benefits had been increased. The letter concluded with the following paragraph, which is the basis of the dispute:

> Don't be fooled into signing misleading cards that are mailed in secrecy. It is said that when you sign such a card, no one other than a Union Representative or a representative of the National Labor Relations Board will ever see this card. This is not the truth. In many cases the signed card is disclosed to the company by the Union, the N.L.R.B., or both of them. Be careful about what you sign—don't sign ANYTHING unless you KNOW what you are signing and what it might mean to you, your family, or your fellow employees.

Section 8 (a) (1) of the Act makes it unlawful for employers to interfere with, restrain, or coerce their employees in the exercise of their guaranteed rights. A threat is deemed to be coercion and is not protected by either the Act or the First Amendment of the Constitution.[4] No proof of coercive intent or effect is necessary to

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1 Int'l Union, UAW.

2 Hobart Bros. and Int'l Union, UAW, 150 N.L.R.B. 956 (1965).

3 "It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." 29 U.S.C. § 158 (a) (1) (1964).

4 NLRB v. Virginia Elec. & Power Co., 314 U.S. 469, (1941).

establish an unfair labor practice under 8(a) (1); it is only necessary to find that the speech or letter can be reasonably interpreted as a threat.[5] So the Board must determine if the letter or speech contains a threat; if there is no threat, section 8(c) of the Act tells the Board there is no unfair labor practice.

A divided court of appeals reversed the Trial Examiner and the Board. The majority held that the Company had only exercised its right to refute a false assertion by the Union that the cards would be kept secret. As far as the warning was concerned, the court felt it was not proper for the Board to infer that the Company was threatening any illegal reprisals. President Hobart may have been only reminding his employees of the drawbacks that accompany union membership, including dues, union political squabbles, and strikes.[6]

Judge Edwards wrote a vigorous dissent[7] to the court's opinion. He noted that the letter was sent immediately after the authorization cards were distributed and while the employees were making an important decision about union representation. Further, the letter was signed by the company President and it stated that he would learn who signed the cards. There was no union in the plant at the time and therefore management had complete power of discharge of any employee at any time for any reason. There was no assurance that reprisals would not be made against those persons who did sign the cards. Judge Edwards believed if all these circumstances were considered there could be no doubt that the letter was a threat, and the court was exercising unwarranted de novo review to upset a reasonable determination of the Board.

The Wagner Act section 10(e) provided: "The findings of the Board as to the facts, if supported by evidence, shall be conclusive."[8] The courts of appeal had interpreted this section as requiring that they review the Board's decisions on factual issues, but some of these courts exercised a limited form of review. Under this narrow review, they would look at one side of the evidence and if testimony was found to support the Board's finding, the courts would affirm the decision, no matter how discredited or contradicted

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5 Time-O-Matic v. NLRB, 264 F.2d 96, 99 (7th Cir. 1959); NLRB v. Illinois Tool Works, 153 F.2d 811, 814 (7th Cir. 1946).

6 NLRB v. Hobart Bros. Co., 372 F.2d 203, 205 (6th Cir. 1967).

7 *Id.* at 207.

8 National Labor Relations Act (Wagner Act), ch. 372, § 10(e), 49 Stat. 454 (1935).

the supporting evidence had been.[9] In 1947 the National Labor Relations Act was amended to read: "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."[10]

In *Universal Camera v. NLRB*[11] the Supreme Court announced that Congress, in amending section 10 (e), intended to prohibit the courts of appeal from continuing their practice of exercising a one-sided form of judicial review. The Court said the *whole* case must be considered and the Board's finding must be supported by *substantial* evidence. Justice Frankfurter went on to say that no drastic reversal of policy was intended, only a compromise between rubber stamping and de novo review of Board decisions was sought. The rule was not:

> [I]ntended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of expertness which courts do not possess and therefore must respect. Nor does it mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the Court would justifiably have made a different choice had the matter been before it *de novo*.[12]

Justice Frankfurter realized that the courts of appeal might have difficulty in applying the elusive rule of *Universal Camera* with any degree of precision. But he hoped they could at least grasp the spirit of the rule,[13] which is this: if there is conflicting evidence as to the existence or nonexistence of a certain fact, the Board is free to decide whether the fact exists, so long as there is substantial evidence on the record as a whole to support that conclusion. Once the existence or nonexistence of the fact is established by the record, the Board is free to draw any inferences from that conclusion so long as the inferences are reasonable.[14]

If the rule of *Universal Camera* is applied to the *Hobart* case, it becomes apparent that the Sixth Circuit missed the spirit of the

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9 *See* NLRB v. Columbia Products Corp., 141 F.2d 687 (2d Cir. 1944); Wilson & Co. v. NLRB, 126 F.2d 114 (7th Cir. 1942). When the committee reported on the § 10(e) amendment, it was critical of the Supreme Court's treatment of the old 10(e). *See*, H.R. REP. No. 510, 80th Cong., 1st Sess. 56 (1947).

10 29 U.S.C. § 160(e) (1964).

11 Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

12 *Id.* at 488.

13 *Id.* at 489.

14 *See* Radio Officers Union v. NLRB, 347 U.S. 17, 50 (1954); NLRB v. Marsh Supermarkets, 327 F.2d 109 (7th Cir. 1963), *cert. denied*, 377 U.S. 944 (1964).

rule. None of the facts are in dispute, so the only question under the substantial evidence rule is whether the Board's inference that the letter contained a threat is reasonable. The court states that it is not exercising de novo review but looking to the record as a whole in an attempt to discover if the Board's finding is supported by substantial evidence.[15] Closer examination of the opinion reveals several discrepancies. The court states that:

> The Trial Examiner was *correct* only in finding that the letter was calculated to convey to the employees that their signing of the union cards would not be kept secret and that the company would probably learn about their signing the cards. He was *incorrect* in finding that the respondent would engage in reprisals against them if they signed the union cards.[16] (Emphasis added.)

According to *Universal Camera,* Congress did not instruct the courts of appeal to determine whether the Trial Examiner was correct. It merely told the courts to determine whether the Board's decision was supported by the evidence, even though the court might have come to a different conclusion if it were reviewing the case de novo.[17] The court proclaims, "We cannot say from the record in this case that the company had no legitimate purpose in urging its employees to be careful before signing a card."[18] Instead, the court should have been asking itself whether the Board reasonably inferred that the letter was a threat. Next the court remarks, "In this case, where the only question is whether or not the letter contained a threat within the meaning of the Act, the Court should be free to reject an improper inference drawn by the Board . . . ."[19] Again the court is displaying a basic misunderstanding of the substantial evidence rule. The Board, by statute, is charged with the responsibility of determining whether the letter contained a threat. The question for the court is not whether the letter contained a threat but whether the Board's characterization of the letter as a threat is reasonable in light of the facts. Next it is stated that "The construction of a writing is not the special expertise of the Board. Rather, it is for the Courts which have more experience and competence in construing and interpreting written instruments."[20]

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15 372 F.2d at 207.

16 *Id.* at 204.

17 340 U.S. at 488.

18 372 F.2d at 206.

19 *Id.*

20 *Id.*

When the writing involves labor relations, contrary to the court's opinion, Congress has indicated that it believes the Board generally has more expertise in interpreting it and in deciding the best policy to pursue with regard to it. The Board must deal with dozens if not hundreds of communications every year between employers and employees concerning union activities. The Board is familiar with the many techniques employers use to threaten employees and with how the employees react to these techniques.[21] Assuming the Board is not as adept at interpreting writings as the court, Justice Frankfurter clearly states in *Universal Camera* that even as to matters not requiring expertise the court must respect the Board's opinion, so long as it is supported by substantial evidence.[22] The Sixth Circuit purported to be applying the substantial evidence rule in *Hobart,* but it failed to do so.

The *Hobart* case, and others like it, have caused a great deal of confusion in the courts of appeal. The Sixth Circuit has followed the substantial evidence rule in its entirety,[23] has recited the dialogue of *Universal Camera* without applying its rule,[24] and has simply declared that the Board's finding of a threat was erroneous, without referring to the substantial evidence rule or any other rule for support.[25] Part of the trouble arises because courts are not willing to abdicate their responsibility for protecting speech to an administrative agency, and part of the trouble arises because the substantial evidence rule inherently tends to create confusion.

The irony is that Congress has also seen the danger of giving the Board such complete control over speech, and in 1947 passed section 8(c) of the National Labor Relations Act in an effort to limit that power.[26] This section designates "threats" as a legal issue, and thereby gives the courts of appeal the power of de novo

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21 For a discussion concerning the problems involved in determining what effect a given speech or letter will have in influencing an election, *see,* Bok, *The Regulation of Campaign Tactics in Representation Elections Under The National Labor Relations Act,* 78 HARV. L. REV. 38, 74 (1964).

22 340 U.S. at 488.

23 *See* NLRB v. Superex Drugs, 341 F.2d 747 (6th Cir. 1965); NLRB v. Kingsford, 313 F.2d 826 (6th Cir. 1963).

24 The *Hobart* case aptly demonstrates this point.

25 *See* Union Carbide Corp. v. NLRB, 310 F.2d 844 (6th Cir. 1962).

26 29 U.S.C. § 158(c) (1964) which says:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute, or be evidence of an unfair practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

review over the Board. If the speech or letter does not contain a threat of force or reprisal, it is not an unfair practice and cannot even be used as evidence of an unfair practice.

Support for this theory can be found in the committee reports of the 80th Congress. The House committee reporting on the proposed amendment stated that the Board, by inferring threats, was using against people what the Constitution allows them to say freely. The committee went on to report that section 8 (c) corrects that situation by requiring that the speech, by its own terms, and standing alone, must be a threat.[27]

The Supreme Court has indicated that it will interpret section 8 (c) as requiring that the threat be included in the speech or letter before a violation of the Act may be found. In a footnote to *NLRB v. Exchange Parts Co.*, the Court explained that it was not going to use a letter from Exchange Parts to its employees as evidence of an unfair practice, since the letter itself contained no express threat, although the Court did admit that the "inference [of economic reprisal] was made almost explicit in [the] letter."[28] Prior to the section 8 (c) amendment, the Supreme Court had ruled that the Board must review all past conduct and speech in determining if the employer had engaged in unlawful coercion.[29]

The soundness of the section 8 (c) argument can be seen by drawing an analogy to section 10 (c) of the Act.[30] That section provides that a person discharged for "cause" shall not be entitled to reinstatement or back pay. The Supreme Court has interpreted section 10 (c) as creating two separate questions. The Board must determine the factual issue of why the person was discharged. After this first question is answered, the legal question of "cause" arises.[31] Th Board must answer this legal question in the first instance, but its decision is subject to de novo review by the courts. Likewise, under section 8 (c) the Board in the first instance should determine as a matter of fact what was said, and then it should decide as a matter of law whether the words contain a threat. The Board's

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27 H.R. REP. No. 245, 80th Cong., 1st Sess. 33 (1947). *Contra,* S. REP. No. 105, 80th Cong., 1st Sess. 23-24 (1947). The Senate report stated that the Board could imply threats. However, it should be noted that the Senate version of § 8 (c) had included the words "express or implied" threats and that these words were omitted in the version that was ultimately adopted, with only the word "contain" being used. S. REP. No. 1126, 80th Cong., 1st Sess. § 8 (c) (1947).

28 375 U.S. 405, 409 (1964).

29 *See* NLRB v. Virginia Elec. & Power Co., 314 U.S. 469 (1941).

30 Labor-Management Relations Act (Taft-Hartley Act), 29 U.S.C. § 160 (c) (1964).

31 *See* NLRB v. Local 1299, Int'l Bhd. of Elec. Workers, 346 U.S. 464, 475 (1953).

decision on the first question is subject to judicial review, but only under *Universal Camera* standards. The Board's decision on the second question is one of law so it is subject to de novo review by the courts.

The decision of the Sixth Circuit in *Hobart* can be justified under the above view of section 8 (c). President Hobart informed his employees that they should not sign anything until they were sure what it might mean to themselves, their families, and their fellow employees. Words can only be understood in their context, so it is relevant to consider that preceding this sentence, the employer told his employees not to be misled into signing cards that are mailed in secrecy. Hobart said the company would discover who signed the cards. Two phrases can be considered meaningless in his letter; thus they must be defined by reference to the surrounding circumstances. "It is said that when you sign such a card no one other than a Union Representative or a representative of the National Labor Relations Board will ever see this card." What card is Hobart referring to, and who said it would be kept secret? The Board must answer these factual questions. In making these factual determinations, the Board would add nothing to the letter that would not already be there, and it would not be inferring that a threat exists. The board would merely attempt to define a meaningless word or phrase that the employer incorporated into his letter. These sterile words are not susceptible of two or more meanings; they are completely meaningless until the Board ascribes some meaning to them. In the *Hobart* case, the Board determined the cards were union authorization cards and the organizing union had claimed they would be kept secret. So long as this finding is supported by substantial evidence it should not be disturbed. With no factual issues and no inferences to be drawn, there is nothing left but a legal issue—*i.e.*, are these words a threat within the meaning of the Act? In the *Hobart* case the letter has no clear meaning. This is not because it is sterile and in need of definition by incorporation, but rather the letter is ambiguous or susceptible of two or more reasonable interpretations. Hobart may have been informing his employees that he would take economic reprisals against them if they voted for the union. It is equally reasonable to interpret his speech as being a mere warning to the employees about the undesirable consequences that accompany union membership, such as dues, strikes, and political squabbles. The Board may select their interpretation, but the decision is a conclusion of law and is subject to de novo review by the court on appeal.

Judge Edwards, dissenting, believed the following to be par-

ticularly relevant: there was no union in the plant, management had complete power of discharge, and there was no assurance this power would not be used against those who signed the cards. When these factors are combined with the words of Hobart, Edwards argued that there is no doubt that the Board's inference of a threat is reasonable. But this is clearly against the mandate of Congress. The speech, standing alone, must contain a threat. It would be stretching the doctrine of incorporation by reference to say that Hobart's letter incorporated all of the factors that Judge Edwards believed relevant to the decision. If the Board or court inferred that the letter is a threat, then it is not deciding that the letter itself contained a threat. Rather, it is deciding that what the letter contained, combined with what is outside the letter, creates a threat by implication.

To date, the courts of appeals have not used the theory of section 8 (c) that is outlined above.[32] The substantial evidence rule has been applied to free speech cases, and the Board has been permitted to imply or infer threats, so long as the inference is reasonable.[33] The few courts that have pondered the meaning of 8 (c) have concluded that it means nothing at all — that Congress merely intended to restate the principles embodied in the First Amendment.[34] But the application of the substantial evidence rule to these cases has caused unwarranted restrictions on freedom of expression. If "threats" were considered a legal issue, there would be fewer problems and inconsistencies. First, the courts of appeal would treat the question like any other question of law and would exercise their own independent judgment as to the legal significance of the words, thus eliminating the confusion as to the proper standard of review. Second, the decisions would provide a reliable precedent for future cases. The Board and the courts would not consider past conduct, prior speeches, or any other factual issue of this sort. The only question would be whether these words, standing alone, contain a threat. Other employers would be able to know in advance what they can and cannot properly say. When "threats" are implied, as at present, employers

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32 *See* NLRB v. J.L. Brandeis & Sons, 145 F.2d 556 (8th Cir. 1944), which interpreted "threats" to be a legal issue, but this case was decided before § 8 (c) was passed.

33 *See* NLRB v. Superex Drugs, 341 F.2d 747 (6th Cir. 1965); Hendrix Mfg. Co. v. NLRB, 321 F.2d 100 (5th Cir. 1963); NLRB v. Kingsford, 313 F.2d 826 (6th Cir. 1963).

34 *See* Great Western Broadcasting Corp. v. NLRB, 310 F.2d 591 (9th Cir. 1962); NLRB v. Bailey Co., 180 F.2d 278 (6th Cir. 1950); NLRB v. La Salle Steel Co., 178 F.2d 829 (7th Cir. 1949), *cert. denied*, 339 U.S. 963 (1950).

do not know whether the words alone were the real cause of the violation or whether it was because the particular employer had a previous National Labor Relations Act violation on his record. There is no predictability under the substantial evidence rule; as a result employers refrain from speech that the Constitution says they can use freely.[35]

Perhaps some will argue that the words used in *Hobart* do have a clear meaning and that meaning is threatening. But that argument misses the problem presented in *Hobart* and the other free speech cases. Congress has indicated its intent to deprive the Board of its power to convict or exonerate Hobart or any other employer on the basis of his past record. Congress has also demonstrated its intent to protect speech by requiring that the Board and the courts must find a threat actually expressed or contained in the speech itself before they can declare it unlawful. This has been designated as a legal issue rather than factual. Therefore, the courts of appeal must make an independent review. If the courts continue to apply the substantial evidence rule to these free speech cases, section 8 (c) will be deprived of all meaning, Congress' intent will be ignored, free speech will be violated, and the hodgepodge of ad hoc decisions will continue.

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35 The vagueness of the present standard restricts speech to such a degree that it raises first amendment issues. This, however, is beyond the scope of the present discussion.